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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

NORMAN RAY RYAN,

Defendant and Appellant.

C063498

(Super. Ct. No.  
08F0005029)

While employed as chief executive officer (CEO) for Haven Humane Society (Haven), a nonprofit animal shelter located near Redding, California, defendant Norman Ray Ryan used a Haven credit card to pay for a personal trip and obtained reimbursement for a company trip he did not take. Defendant was thereafter convicted of two counts each of unauthorized use of personal identifying information (Pen. Code, § 530.5, subd. (a)) and grand theft (*id.* at § 487, subd. (a)) and was placed on formal probation for a period of three years. (Undesignated section references that follow are to the Penal Code.)

Defendant appeals, contending his conviction on one count of unauthorized use of personal identifying information must be reversed, because that charge was based on unauthorized use of a corporate logo and a corporate logo does not qualify as personal identifying information for purposes of such a charge. Defendant also claims instructional error, prosecutorial misconduct, and ineffective assistance of counsel. We reject each of these contentions and affirm the judgment.

### FACTS AND PROCEEDINGS

Haven is a nonprofit organization that operates an animal shelter in Anderson, California. Defendant was hired as Haven's chief executive officer in May 2007. During defendant's tenure, Haven had a VISA credit card account which defendant used on occasion to pay for Haven expenses. At other times, defendant paid for Haven expenses with his own funds and asked for reimbursement.

The controller for Haven at the time was Cheryl W. Defendant submitted requests for reimbursement to Cheryl. When he did so, Cheryl asked for documentation to support the request. Sometimes she would not receive it, despite multiple requests.

A few months after defendant came to work at Haven, he called Cheryl W. into his office to discuss a proposed trip to a conference in Chicago. The conference was purportedly sponsored by the Humane Society of the United States (HSUS). Defendant

indicated he intended to go to the conference then immediately use vacation time for a personal trip to the Philippines.

Defendant ultimately did not go to the conference in Chicago. There was, in fact, no such conference sponsored by HSUS. Instead, defendant flew from Redding to San Francisco and from there to the Philippines as planned. Defendant paid for the trip from Redding to San Francisco using the Haven credit card. He did not thereafter reimburse Haven for the cost, which was \$603.80 (counts 4 and 5).

In December 2007, defendant asked Cheryl W. to process a check for him for expenses in the amount of \$783.14. He came to her office with a piece of paper, which he identified as a receipt for a Southwest Airlines flight to the Chicago conference. Cheryl wrote down the amount from the receipt and told defendant she would need a requisition form signed by him with the receipt attached. Cheryl later brought the check to defendant for his signature. Defendant took the check but never provided the requested paperwork.

Cheryl W. later found the Southwest Airlines receipt on defendant's desk and made a copy of it. The document showed a flight from San Francisco to Chicago on October 30, 2007, returning on November 2. The departure flight number was 106; the return flight number was 1009. A Southwest Airlines custodian of records testified at trial that there is no record of defendant having flown on a Southwest flight between October 30 and November 2. He further testified flight number 106 from San Francisco on October 30, 2007, did not go to

Chicago, and there was no flight number 1009 from Chicago on November 2. The custodian indicated the receipt defendant showed to Cheryl had been altered.

Yvonne P., a Haven board member, testified that she had encouraged defendant to seek training about animals and was happy to hear he was planning to attend the conference in Chicago. After defendant's trip to the Philippines, Yvonne asked defendant about the Chicago conference. Defendant "kind of changed the subject[] and said we would talk about it later . . . ."

Defendant was later terminated from Haven for reasons other than the matters charged in this case.

Defendant was charged with one count of embezzlement (\$ 424), two counts of identity theft, and two counts of grand theft. At trial, defendant testified that he did in fact use the Haven credit card to pay for the personal trip from Redding to San Francisco and did not reimburse Haven. Defendant indicated Haven never asked him for reimbursement. Regarding the Chicago trip, defendant testified he intended to attend a conference in Chicago sponsored by Kintera, not HSUS, but, at the last minute, decided not to go. Defendant denied having prepared the altered Southwest Airlines receipt and denied having presented it to Cheryl W. for reimbursement. Defendant indicated he thought the reimbursement check he received from Cheryl was for a business trip he took to Portland, for which he had not been reimbursed.

Defendant was convicted on all charges. The trial court later dismissed the embezzlement count. The court then suspended imposition of sentence and placed defendant on formal probation for three years, with 180 days in jail on count 2, a concurrent 180 days on count 3, 180 days on a work program on count 4, and a concurrent amount on count 5.

## DISCUSSION

### I

#### *Unauthorized Use of Southwest Logo*

Defendant was charged in count 2 with unlawful use of the personal identifying information of Southwest Airlines. The prosecution theory was that defendant used a fraudulent Southwest Airlines receipt bearing a Southwest logo to obtain reimbursement for a flight from San Francisco to Chicago that he did not in fact take. Defendant was convicted as charged.

Defendant contends his conviction on count 2 is not supported by substantial evidence, because a corporate logo does not qualify as personal identifying information.

Section 530.5, subdivision (a), reads in relevant part: "Every person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense." Section 530.55, subdivision (a), defines "person" to include a corporation or other such legal entity.

Section 530.55, subdivision (b), defines "personal identifying information" as "any name, address, telephone number, health insurance number, taxpayer identification number, school identification number, state or federal driver's license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person, or an equivalent form of identification."

Defendant contends the list of items specified in section 530.55, subdivision (b), does not include a corporate logo. Defendant further argues the catch-all phrase, "an equivalent form of identification," should not be read to include corporate logos, because such logos are different from the listed items in that logos are meant to be widely distributed, whereas the items included in section 530.55, subdivision (b), are of a personal nature not meant for public consumption.

The People respond that there is no limit in section 530.55, subdivision (b), to information that is confidential, and a corporate logo is nothing more than the corporation's name, which is included in the list. The People point out that a politician might want his or her name to be widely known, yet misuse of that name by another could still violate section 530.5.

We need not decide whether corporate logos in general qualify as personal identifying information within the meaning of section 530.55, subdivision (b). In the present matter, the document presented by defendant to Cheryl W. to support his claim for reimbursement contained much more than just a corporate logo. The document appears to be a two-page email message confirming the Chicago flight. The top of the first page of the message reads as follows:

"Ticketless Confirmation - RYAN/NORMAN - 5U2SYC

"From: **Southwest Airlines**

(SouthwestAirlines@mail.southwest.com)

"Sent: Tue 10/13/07 10:37 PM

"Reply-to: Southwest Airlines

(SouthwestAirlines@mail.southwest.com)

"To: NR498@hotmail.com"

Below the foregoing is a confirmation statement containing the details of the flight, including dates, flight numbers, destinations, and costs. The top left-hand corner of this section contains what appears to be a corporate logo for Southwest Airlines, with the picture of an airplane above

"SOUTHWEST.COM." Near the bottom of the first page of the document is the following fare rule: "Valid only on Southwest Airlines. All travel involving funds from this Confirm no. must be completed by 10/14/08. Any change to this itinerary may result in a fare increase." The second page contains the caption "Southwest Airlines Co. Notice of Incorporated Terms" followed by: "Air transportation by Southwest Airlines is subject to Southwest Airlines' Passenger Contract of Carriage, the terms of which are incorporated by reference."

It is clear from the foregoing that the document in question contains much more than just the corporate logo for Southwest Airlines. In several locations, it contains the name of the company itself. Defendant does not dispute that the name of a company qualifies as personal identifying information within the meaning of section 530.55, subdivision (b). Hence, defendant's substantial evidence claim fails.

## II

### *Adoptive Admissions Instruction*

Yvonne P. testified that, following defendant's trip to the Philippines, which occurred right after his purported trip to the Chicago conference, she mentioned the conference to defendant and he "kind of changed the subject[]" and said he would talk to her later about it.

Defendant contends this evasive response amounted to an adoptive admission. According to defendant, it is undisputed he received a reimbursement check for \$783.14. Defendant testified

he thought the check was reimbursement for a trip to Portland he had taken earlier and for which he had not been reimbursed. Hence, he argues, "an admission via [Yvonne] that [defendant] was still maintaining he went to Chicago after the date of the putative trip would be powerful evidence of guilt."

In light of this adoptive admission, defendant argues, the trial court should have instructed the jury with CALCRIM No. 357. That instruction reads: "If you conclude that someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose." The trial court did not give this instruction.

Defendant argues that, had the jury been so instructed, it would have been required to evaluate the adoptive admission under all the circumstances and, since the prosecution did not provide any evidence of the circumstances surrounding the

exchange, the jury would have been required to find he made no adoptive admission.

We are not persuaded. First, defendant did not request such an instruction, and the trial court had no duty to instruct with CALCRIM No. 357 sua sponte. (*People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198.) More importantly, there was no adoptive admission in this instance. Yvonne P. did not accuse defendant of a crime or make a statement that tended to connect him with a crime. She merely asked about the Chicago conference. Defendant's evasive response was not an adoptive admission of a crime, but an implicit assertion that he did in fact attend the Chicago conference. Defendant did not commit a crime by attending the Chicago conference. His crime was in pretending that he had when he had not and thereafter seeking reimbursement for expenses. Hence, his evasive response to Yvonne was actually an act in furtherance of the crime itself. In other words, the response was not an admission of a completed crime but an additional step in the perpetration of the crime. There was no error in failing to give CALCRIM No. 357.

### III

#### *Prosecutorial Misconduct*

Defendant contends the prosecutor committed misconduct in three ways: (1) vouching for the veracity of a witness; (2) labeling defendant a "politician"; and (3) referring to nonexistent evidence during argument.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819.) On a claim of prosecutorial misconduct, it is not necessary to show bad faith (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214), but it is necessary to show prejudice (*People v. Epps* (1981) 122 Cal.App.3d 691, 706). “The ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred.” (*People v. Strickland* (1974) 11 Cal.3d 946, 955.)

Defendant failed to object to any of the alleged instances of prosecutorial misconduct. “As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]’ [Citation.] [¶] The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either

a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if “an admonition would not have cured the harm caused by the misconduct.” [Citations.]” (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

Defendant does not contend an objection or request for admonition as to any of the alleged misconduct would have been futile or would not have cured the harm caused by the misconduct. Instead, he argues his counsel’s failure to object amounted to ineffective assistance. We consider that argument in the next section.

#### IV

##### *Ineffective Assistance*

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right “entitles the defendant not to some bare assistance but rather to *effective* assistance” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215), and applies whether defense counsel is appointed by the court or retained by the defendant (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147).

“To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1)

trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy.

[Citation.] Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.'

[Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Defendant claims numerous instances in which his trial counsel provided ineffective assistance under the foregoing standard. We shall address each of these in turn.

#### Prior Bad Acts Evidence

Defendant contends counsel failed to object to the following evidence of bad acts on his part, as presented through the testimony of Cheryl W. and Yvonne P.: (1) defendant was not

at work very often; (2) defendant was not doing his job, performed poorly, and had a consulting job on the side for which he took the trip to the Philippines; (3) defendant had been appointed to a police committee but had not obtained approval from Haven's board; (4) defendant failed to provide documentation for many of his claims for reimbursement; (5) defendant seldom provided receipts for his use of the Haven credit card; (6) defendant was dilatory in signing checks to pay Haven bills; (7) defendant provided a budget to the Haven board that was both late and unsatisfactory; (8) defendant was terminated for inadequate performance; (9) defendant's desk was messy; and (10) whatever Haven employees observed on his desk after his departure caused them to call the police.

None of the asserted instances of bad acts by defendant concerned criminal matters. In fact, when the prosecution sought to present evidence of uncharged criminal wrongdoing regarding the possible theft of Haven donations, defense counsel objected and the trial court excluded the evidence. Most of the items suggest nothing more than that defendant was not a very good employee. Although defendant's failure to provide receipts and other documentation and the fact employees called the police after observing defendant's desk could suggest there may have been other wrongdoing similar to that charged in this matter, other evidence was presented that Haven conducted an audit and found none.

Defendant contends in any event there was no conceivable tactical reason for counsel not to object to the foregoing

evidence. We disagree. If nothing else, because the evidence was, as a whole, relatively inconsequential to the offenses charged, defense counsel might well have concluded an objection would only serve to highlight the evidence in the eyes of the jury.

"Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*Ibid.*) "[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.)

On the record before us, we cannot say counsel's failure to object amounted to ineffective assistance.

#### Change of Venue

Defendant argues that, despite the prevalence of Haven in the small Redding community and the large number of news articles about the case in the local press, "[t]here can be little doubt that the prosecution's case against [defendant] was widely publicized in the local Shasta County media prior to trial and that many citizens had formed their opinions." Therefore, defendant argues, his counsel should have moved for a change of venue, and his failure to do so amounted to ineffective assistance.

"A trial court must order a change of venue for trial of a criminal case to another county on motion of the defendant 'when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be held in the county.' (§ 1033, subd. (a).)" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1250.) The trial court's determination is "based on a consideration of five factors: '(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394.)

Defendant contends all five factors favored a change of venue in this instance. He argues the crimes, although not grave in the abstract, were nevertheless taken seriously in the community. Regarding media coverage, defendant argues Redding is a one-paper town and that paper gave the case "blanket coverage." He argues there was also "considerable" online and local television coverage. As to community size, defendant characterizes Redding as a "small town," despite its population of around 100,000, and argues the "deluge" of local media coverage would affect a very large proportion of the population. As to the prominence of defendant and the victim, he argues he "had status and high profile in the community" by virtue of being the CEO of Haven and Haven touched the lives of most people living in the community. According to defendant, "the media portrayal of an important non-profit community institution being cheated by its own CEO rang a bell of prejudicial emotion

in the town of Redding that made it impossible for [defendant] to receive a fair trial in that locale."

Defendant grossly overstates his case. First, regarding media coverage, defendant relies on evidence that is not in the record before us. To the extent such evidence is relevant to his claim of ineffective assistance, it would be more properly presented in a petition for writ of habeas corpus. As for the fact that seven requests were filed with the court for media coverage, this evidence is not put in context. There is no way to determine whether this is an unusually large number of such requests. Defendant points out that one reporter, John C., published an article about defendant, but fails to mention that John did not work in Redding and the article did not appear locally (see discussion *infra*). At any rate, it is not simply the fact of extensive media coverage but whether that coverage "was unfair or slanted against [the defendant] or revealed incriminating facts that were not introduced at trial." (*People v. Ramirez* (2006) 39 Cal.4th 398, 434.) The relevant inquiry on a change of venue motion is not whether there was extensive media coverage, but whether that coverage is likely to result in jurors who have "such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Yount* (1984) 467 U.S. 1025, 1035 [81 L.Ed.2d 847, 856].)

As for seriousness of the crimes, defendant attempts to bootstrap this element by relying on the media coverage element to argue the crimes were taken seriously in the community.

However, there is no evidence to support this assertion. The crimes involved the theft of less than \$1,400.

Regarding community size, this factor does not really cut either way. Although Redding is not a large community, it is not a small town either.

As for the prominence of defendant and Haven, the fact that defendant was the CEO and Haven was an animal shelter does not necessarily make them prominent. Defendant had only recently moved to the community, and the record contains no evidence as to the status of Haven in the Redding area. Again, to the extent these factors cut in favor of a change of venue, they would be more properly established in connection with a petition for writ of habeas corpus.

On the record before us, there is no reason to believe a change of venue motion would have been granted. Furthermore, defendant points to nothing to suggest a change of venue would likely have resulted in a more favorable result for him. There is no reason to believe a different community would have looked more favorably on a CEO charged with theft from a nonprofit animal shelter. Hence, we cannot conclude defense counsel provided ineffective assistance in failing to move for a change of venue.

#### Impeachment of Yvonne P.

Yvonne P. was the chairman of Haven's board at the time of defendant's termination. This was an unpaid position. After the termination, Yvonne took over as interim CEO. She testified

that defendant told her about the Chicago conference and, when she asked him about it afterward, he gave an evasive answer.

Defendant contends trial counsel's failure to impeach Yvonne P. amounted to ineffective assistance. He argues Yvonne had an obvious conflict of interest by virtue of the fact she took over his job after he was terminated. In particular, defendant argues that while Yvonne revealed she took over as interim CEO, she was not asked if she was being paid for the position. Nor did defense counsel call Richard S., Haven's director of animal welfare operations, who could have testified that the board voted to pay Yvonne. Defendant argues: "If [Yvonne] denied being paid, then follow-up questions of other prosecution witnesses would have shown she was lying and her credibility would have dropped to zero."

Defendant further argues his counsel should have inquired about whether Yvonne was trying to turn Haven into her own private fiefdom. Defendant argues there was evidence available that Yvonne had driven off the prior CEO of Haven and started hiring her friends to run the organization.

Finally, defendant argues defense counsel should have presented evidence that Yvonne was not qualified to run Haven.

We fail to see what any alleged desire by Yvonne P. to replace defendant as CEO of Haven or to bring in her friends to run the organization has to do with the prosecution of defendant for identity theft and grand theft. There is no evidence that defendant's termination as CEO of Haven was related to his commission of the crimes. Defendant's argument that Yvonne's

credibility would have been destroyed is premised on an assumption that she would have lied under oath about being paid for the job. Such presumption is unwarranted. Finally, Yvonne's qualifications for the CEO position have nothing to do with this case or her credibility. Hence, any attempt to impeach Yvonne as argued by defendant would have been unavailing.

#### Impeachment of Cheryl W.

Likewise, any attempt to impeach Cheryl W. would have been futile. Cheryl was the key witness to testify about the fake Southwest Airlines receipt. Defendant contends defense counsel should have impeached Cheryl about her lack of background, training, qualifications, and experience to be the controller of a large nonprofit organization. According to defendant "[c]ompetence was essential to her claims against [defendant's] dilatory financial practices." Defendant further argues Richard S. could have testified that he caught Cheryl going through defendant's desk drawer one day, which "would bring into question [Cheryl's] testimony that she just happened to find an incriminating (Southwest Airlines confirmation) document when she was in [defendant's] office alone." Richard S. considered Cheryl to be "a busybody" who "tried to go out of her way to get other people in trouble."

Cheryl W.'s competence as the controller for Haven has no relevance to this matter or to her credibility. There is no reason to believe one who is competent to do her job is any more

or less credible to testify about facts she observed than one who is incompetent. Furthermore, it does not matter whether Cheryl happened upon the Southwest Airlines receipt in defendant's office or went there looking for it. The relevant fact is that she found it there and it appeared to be what defendant had shown her when he requested reimbursement. Therefore, failure to impeach Cheryl, as argued, did not amount to ineffective assistance.

### Prosecutorial Misconduct

As noted in the preceding section, defense counsel failed to object to three alleged instances of prosecutorial misconduct: (1) vouching for the veracity of a witness; (2) labeling defendant a "politician"; and (3) referring to nonexistent evidence during argument. Defendant contends this amounted to ineffective assistance. However, because we find no prejudicial misconduct, there could be no ineffective assistance in this regard.

John C. testified for the prosecution. John was a reporter from Long Beach, where defendant had previously run for mayor and other political offices. John testified that, after he learned of the charges in this matter, he called defendant and interviewed him. John later wrote an article stemming from the interview. In the conversation, defendant told John that he did, in fact, go to the Chicago conference, flying from Redding to San Francisco and then on to Chicago. Defendant claimed there was simply a misunderstanding regarding the use of a

credit card. John quoted defendant as saying: "'How do you book a flight on a credit card that doesn't exist? I took the trip. There seems to be a disagreement about whether the purposes of the trip were state [sic].'" John further testified defendant told him "he felt that he would be able to clear this up by showing the appropriate parties that he had materials from the conference."

During argument to the jury, the prosecutor said: "[I]n order to find [defendant] not guilty you have to buy into this theory that he is the only person who is telling the truth. You have to disbelieve Cheryl [W.] when she tells you about the procedure, protocol, what she did, what the defendant told her before and after this trip. . . . [¶] You have to disbelieve Yvonne [P.] who the defendant told previous to the trip that he was going to Chicago to this conference and confirm that later when he told her we will talk about it some other time. *You got to think that John [C.] is lying; that this reporter would put his livelihood, his own reputation, on the line for this guy. That's what you have to believe in order to find the defendant not guilty.*" (Italics added.)

Defendant argues the italicized portion of the foregoing argument by the prosecutor amounted to vouching for the veracity of a witness. "[A] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.] It is misconduct, however, to suggest to the jury in arguing the veracity of a

witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them." (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, overruled on other grounds in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.)

In *United States v. Martinez* (6th Cir. 1992) 981 F.2d 867, the prosecutor argued there was nothing particularly significant about the defendant that would have caused a police witness to risk his 18-year career by lying in court about her. The defendant claimed this was improper vouching, because there was no evidence in the record that the witness risked his career by lying. (*Id.* at p. 871.) The Circuit Court of Appeals concluded that, while this may have been improper, it was an isolated incident that did not prejudice the defendant. (*Ibid.*)

Here too, there was no evidence that John C. was putting his job on the line if he testified falsely. But even assuming the prosecutor went too far in this regard, it is unlikely defendant was prejudiced thereby. There is nothing in the record to suggest John had anything to gain by lying about what defendant told him. Hence, any suggestion that John might lose his job if he testified falsely added little to his credibility. In addition, the jury was instructed that it must decide the case based on the evidence and nothing the attorneys say in argument is evidence. Absent a contrary indication in the record, we assume the jury followed the instructions given by

the court. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) This instruction would have mitigated any possible adverse effect of the prosecutor's argument. (See *United States v. Martinez, supra*, 981 F.2d at p. 871.)

As noted earlier, in order to prevail on a claim of ineffective assistance, a defendant must show prejudice flowing from counsel's performance or lack thereof. "Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*In re Avena* (1996) 12 Cal.4th 694, 721.) In this instance, it is not reasonably probable the result would have been different if defense counsel had objected to the prosecutor's comment.

Defendant contends the prosecutor also committed misconduct by referring to him as a "politician" during argument. He cites as support *People v. Sanders* (1995) 11 Cal.4th 475, where the state high court suggested that referring to a capital defendant as a "monster" may have exceeded the bounds of fair argument. (*Id.* at p. 527) He also cites *Copp v. Paxton* (1996) 45 Cal.App.4th 829 (*Copp*), a civil case in which, according to defendant, the court held the term "crooked politician" stated an opinion rather than a fact. Defendant argues prosecutors are not permitted to state opinions that appeal to the passions or prejudices of juries.

Defendant misstates the holding in *Copp*. The alleged defamation in that case did not involve calling the plaintiff a

"crooked politician." Rather, *Copp* cited another decision, *Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 190-191, where that was the case. At any rate, what made the reference an opinion rather than a fact was not the word "politician" but the word "crooked." Defendant appears to suggest the word "crooked" is a redundancy and that all politicians are considered to be crooked. But that suggestion is both unfair and unwarranted. Likewise, defendant's attempt to equate the label "monster" with "politician" is absurd.

The American Heritage Dictionary defines "politician" as "[o]ne who is actively involved in politics, esp. party politics" or "[o]ne who holds or seeks a political office." (American Heritage Dict. (2d college ed. 1982) p. 960.) On the other hand, it also defines a politician as, "[o]ne who seeks personal or partisan gain, often by cunning or dishonest means." (*Ibid.*)

The label "politician" properly applied to defendant. The record indicated defendant had previously run for three political offices in the Long Beach area. And while he did not hold a political office at the time of the offenses charged in this matter, John C. reported that defendant told him he resigned from Haven in order to run for Redding City Treasurer. Hence, there was no misconduct in referring to defendant as a politician, and no ineffective assistance in failing to object to such label.

Defendant next contends the prosecutor committed misconduct by referring in argument to nonexistent testimony. In order to

understand this argument, some background information is necessary.

Nadine B., who was a Haven board member at the time, testified that on the day defendant was terminated, she went into defendant's office and looked around. Yvonne P. testified she too went into defendant's office the day he was terminated and helped gather documents to turn over to the police. Yvonne further testified she was never given access to defendant's office after that day and cleaned up the office only after the police came and took items away. Carlos A., an independent contractor working for Haven, testified he entered defendant's office between the time of defendant's termination and the police arrival and copied the hard disk from defendant's computer.

When the Redding Police Department (RPD) came to Haven after defendant's termination, they confiscated items from defendant's office, including his computer. Dan Kartchner, an investigator for the Shasta County District Attorney's Office, testified that he examined defendant's computer and found on it a copy of the fabricated Southwest Airlines receipt.

In his closing argument to the jury, defense counsel asserted that there was a long period during which a lot of people had access to defendant's office between the time defendant was terminated and when the police came and confiscated his computer. Counsel further argued anyone could have created the Southwest Airlines receipt that was found on defendant's computer.

The prosecutor provided the following response to this argument: "And after the defendant was gone when Yvonne [P.] and Nadine [B.] saw the mess and -- and knew right away that they needed to get law enforcement involved Yvonne [P.] told you that she did takeover [sic] as acting CEO, but she did not work out of his office. She kept it closed until RPD came out and that's the point at which they went through the documents and turned things over. The office was locked. The only person who may have gone in that office in the time between when defendant left, when RPD arrived was Carlos [A.] who said all he did is go in and copy the hard drive and leave. [¶] So there's absolutely no opportunity in which anybody could have manipulated or tampered with that computer."

Defendant contends there is no evidence in the record to support the prosecutor's assertion that Yvonne P. kept defendant's office closed or locked between the time of his departure and the arrival of the police. The People argue in response that the statement about there having been no opportunity for anyone to tamper with defendant's computer is "a fair comment on the evidence presented at trial." However, this argument ignores defendant's assertion that there was no testimony to support the fact on which that fair comment was premised, i.e., that defendant's office was closed and locked until after the police arrived.

We agree there is nothing in the evidence to suggest defendant's office was locked and access to it was barred between defendant's departure and the arrival of the police. On

the contrary, it is reasonable to infer that, at the time of defendant's termination, he was forced to turn in his office key, which would then have been in the possession of somebody else at Haven. Hence, it cannot reasonably be inferred from the evidence that nobody had access to defendant's computer until after the police arrived.

However, as noted earlier, the jury was instructed that the arguments of counsel are not evidence and that it must decide the case based on the evidence. The jury was informed that, between the time of defendant's departure and the arrival of the police, Carlos A. was given access to defendant's computer to copy the hard drive. Thus, the jury was well aware at least somebody had access to defendant's office and computer, even if the office otherwise remained locked. We conclude the jury would not have been misled by the prosecutor's argument about the office being closed and locked to conclude that it is not possible for someone to have created the Southwest Airlines receipt on defendant's computer after his departure. We therefore find no prejudice in counsel's failure to object to the prosecutor's overstatement about the lack of access to defendant's computer.

#### Hearsay Evidence

Defendant contends Yvonne P.'s testimony about him giving an evasive answer when she questioned him about the Chicago conference was hearsay and lacked a proper foundation as an adoptive admission. Therefore, he argues, defense counsel's

failure to object to the testimony on those grounds amounted to ineffective assistance.

However, as discussed previously, defendant's evasive response was not an adoptive admission. Nor was it hearsay evidence, despite the fact Yvonne P. was testifying about what defendant had said to her. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Defendant's statement to Yvonne that he would talk to her later about the Chicago conference was not offered to prove the truth of the matter stated. Even if considered as an inference that defendant had in fact gone to the conference, it was not admitted to prove the truth of such inference. Quite the contrary, the prosecution sought to prove defendant had not gone to the conference. Defendant's statement was actually part of the res gestae of the crime, inasmuch as defendant was attempting to perpetuate the fiction that he had in fact attended the conference. Thus, defense counsel had no basis for objecting to the testimony and his failure to do so was not ineffective assistance.

#### Law Enforcement Bias

Defendant contends his counsel provided ineffective assistance in failing to inquire about possible law enforcement bias in connection with this prosecution. Defendant points out that he was on a police committee involved in relocation of the

police department to a new building and there was serious disagreement between himself and the police chief at the time on the issue. Defendant argues, "this case cried out for a defense of bias and, possibly, vindictive prosecution or even a conspiracy to send [defendant] to prison." According to defendant, vast amounts of police and district attorney resources were consumed by this case, and there is reason to believe defendant was overcharged in order to ensure a prison term. He argues it is reasonably probable that if these matters had been brought to the attention of the jury, the outcome of the case would have been different.

Again, we are not persuaded. Defendant's purported evidence of police bias is speculative. There is no evidence that the one party defendant had a disagreement with, the former police chief, played any role in this prosecution. At any rate, this case presented a credibility contest between defendant and various Haven representatives, not between defendant and law enforcement. There is nothing to indicate any alleged police bias played a role in the outcome of the case and, hence, no reason to believe any such evidence would have been admissible.

#### Good Character Evidence

Defendant contends his counsel provided ineffective assistance in failing to present evidence of his good character. He argues Cheryl W., a bookkeeper acting as controller, and Yvonne P., who had less than a year of actual work experience, "were allowed to testify unchallenged as competent

professionals, while the qualifications of [defendant], who had an MBA and was certified by the Association of Finance Professionals [citation], were either not introduced or treated perfunctorily . . . .”

We fail to see what the respective professional qualifications of defendant and the indicated prosecution witnesses had to do with their credibility. There is no reason to believe one with little formal education or job experience would testify any less credibly than one with advanced degrees and significant job experience.

Defendant contends counsel also failed to present evidence of his reputation for competence and honesty. In particular, he points out that new counsel, who prepared defendant’s motion for new trial, was able to line up a number of witnesses, including a former FBI agent and a Bishop of the Mormon Church, to attest to defendant’s good character. Defendant argues there was no possible tactical reason for failing to present this evidence.

We disagree. The prosecution sought to present evidence that several open and empty donation envelopes were found in defendant’s office after his departure and there was no entry in Haven’s records for donations from the senders. The prosecution also sought to present evidence that, shortly after defendant took over as CEO, he changed the way Haven counted cash donations collected in “doggy banks” located at various public places. Previously the counting had been done by two people, but defendant started doing it himself behind closed doors. Haven noticed that donations declined after this change in

procedure. The trial court indicated the issue must be analyzed under Evidence Code section 352 and deferred ruling on the matter. The prosecution did not pursue it further. In light of the foregoing, defense counsel may well have concluded introduction of good character evidence would open the door to such uncharged crimes evidence.

At any rate, defendant's argument would be more appropriate in a petition for writ of habeas corpus, where the evidence supporting and opposing the issue can be presented. Under the circumstances here, we cannot say defense counsel had no possible tactical basis for failing to introduce evidence of defendant's good character.

#### Defense Closing Argument

Defendant contends defense counsel's pattern of argument to the jury was as follows: "first, characterize the entire case as one of mistakes, second emphasize unimportant prosecution errors, and, finally, hint at some sort of vague, undefined and unmotivated effort by persons unknown to incriminate [defendant]—sometimes followed by a quick statement either backing off the hint or subtly denigrating [defendant]."

Defendant also points out that defense counsel hinted at the triviality of an alleged theft of roughly \$1,300 but then immediately said any theft is important. He further points out that counsel argued John C. had spoken to police investigators before interviewing defendant, but then said he was not suggesting the investigators had any bad motives. According to

defendant, defense counsel never ventured into the area of who might have had a motive to fabricate the Southwest Airlines receipt.

Here, again, we cannot determine on the record before us whether defense counsel had a reasonable tactical basis for pursuing the various themes he used in argument. Certainly, there was no problem in arguing the case was about mistakes. Defendant himself testified he made a mistake in failing to reimburse for the flight from Redding to San Francisco. There is also nothing wrong with acknowledging that any theft is important and denying any suggestion that defense counsel believed police investigators had acted with improper motives. Defendant's theory was not that the police fabricated the Southwest Airlines receipt but that this had been done by someone at Haven. Finally, as for counsel's failure to venture into the area of who might have had a motive to set defendant up, this may simply reflect the fact there was no evidence to support such an argument.

### Defense Strategy

Defendant contends his trial counsel provided ineffective assistance by pursuing a defense of mistake rather than emphasizing how Haven, the police and the prosecution went overboard in prosecuting a minor offense. Defendant argues a defense of mistake was fatally flawed, because there could be no mistake in fabricating a Southwest Airlines receipt. By contrast, highlighting the unusually high level of resources put

into this matter, along with the fact that Haven reported the case to authorities despite an incentive to avoid adverse publicity, would have suggested to the jury that defendant might have been set up in order to get him out of the way.

We cannot agree. Under the circumstances presented, we cannot say a defense of mistake was an unsound strategy. Defendant admitted using the Haven credit card for the trip from Redding to San Francisco and not reimbursing Haven. Counsel argued defendant forgot to reimburse Haven and nobody at Haven reminded him about it. Defendant admitted he did not take the trip to Chicago but did take a trip to Portland. He asserted Cheryl W. asked him if he wanted to be paid for the Portland trip and, when he received the check for the Chicago trip, he thought it was for the Portland trip. According to defendant, Cheryl told him he was being reimbursed for the Portland trip. Counsel, in turn, argued defendant did not know when he received the check that it was for the non-existent Chicago trip. Again, this was a mistake.

The only part that wasn't a mistake, according to defendant, was the Southwest Airlines receipt. Defendant testified he intended to go to Chicago but then changed his mind at the last minute. Defendant denied preparing the Southwest receipt or presenting it to Cheryl W. but instead claimed Cheryl told him he was being reimbursed for the Portland trip. In other words, defendant was essentially asserting that he had been set up by Cheryl.

In his argument to the jury, defense counsel pointed out that defendant was terminated on April 2 but the police did not arrive at Haven until at least April 11, leaving a significant period of time for someone else to access defendant's computer and prepare the Southwest receipt. Counsel further pointed out that many people had access to defendant's office and anyone could have accessed defendant's computer. Defendant testified the computer was not password protected. Thus, counsel attempted to create a reasonable doubt about whether it had been defendant who prepared the Southwest receipt.

Defendant contends counsel should also have pursued a strategy that emphasized the unusual amount of resources dedicated to prosecuting defendant for such minor crimes. Defendant argues the defense should have concentrated on three fundamental questions: (1) "Why did Haven Humane Society act contrary to its own best interests by going public and seeking criminal prosecution?" (2) "Why did the Redding Police Department undertake such an extensive effort to find evidence to incriminate [defendant]?" (3) "Why did the district attorney's office go the extra mile to secure a prison term?"

However, the short answer as to why defense counsel did not pursue this strategy is that defense counsel may well have been concerned that this would open the door to the prosecution introducing evidence of other potential wrongdoing by defendant, as described above. In addition, defense counsel may well have recognized how counter-productive it could be to try and divert blame to law enforcement authorities, especially where there is

no suggestion that such authorities themselves were involved in the fabrication of evidence. The fact that law enforcement may have allocated an inordinate amount of resources to the case does not mean the results they reached were wrong. Quite the contrary. Even if defendant could have shown the authorities would not have pursued this matter but for a bias against defendant, this would not negate the fact defendant nevertheless committed the crimes.

#### Cumulative Effect of Ineffective Assistance

Defendant contends the cumulative effect of the various instances of ineffective assistance warrant reversal of his convictions. As discussed above, there were two potential instances of ineffective assistance, failing to object to prosecutorial misconduct in vouching for a prosecution witness and failing to object to prosecution argument that referred to nonexistent evidence. However, as we explained, these instances had little or no effect on the outcome of this case and, cumulatively, also did not affect the outcome.

### V

#### *Cumulative Effect of Errors*

Defendant contends the cumulative effect of errors in this case amounted to a denial of due process. However, as explained above, the only potential error we find concerns two instances where defense counsel may have provided ineffective assistance. We have already concluded the cumulative effect of these two instances did not result in any prejudice to defendant. Hence,

we have no occasion to consider cumulative effect of errors in this case.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_  
HULL, J.

We concur:

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RAYE, P. J.

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BLEASE, J.